

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

**DERRICK RICHARDSON v. VIRGINIA LEWIS, WARDEN and the
STATE OF TENNESSEE**

**Appeal from the Circuit Court for Bledsoe County
No. 2-2005 Thomas W. Graham, Judge**

No. E2005-00817-CCA-R3-HC - Filed December 1, 2006

The petitioner, Derrick Richardson, appeals from the trial court's order dismissing his petition for writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Derrick Richardson, Whiteville, Tennessee, Pro se.

Paul G. Summers, Attorney General and Reporter; Elizabeth Bingham Marney, Assistant Attorney General; for the appellee, State of Tennessee.

MEMORANDUM OPINION

The petitioner, Derrick Richardson, was convicted in January 1993 of first degree murder and sentenced to life imprisonment. The judgment was affirmed on appeal. See State v. Derrick Richardson, No. 03C01-9305-CR-00165 (Tenn. Crim. App. June 9, 1994), app. denied (Tenn. Sept. 12, 1994). The petitioner sought post-conviction relief from his conviction based on his claim that he received ineffective assistance of counsel. The trial court denied relief following an evidentiary hearing, and this court affirmed the judgment. See Derrick Richardson v. State, No. 03C01-9605-CR-00186 (Tenn. Crim. App. Jan. 21, 1998), app. denied (Tenn. June 8, 1998).

On January 5, 2005, the petitioner filed a petition for writ of habeas corpus in which he claimed a void judgment based on several grounds. Specifically, the petitioner asserted that: (1) the trial court incorrectly instructed the jury on first and second degree murder; (2) the trial court failed to instruct the jury regarding the natural and probable consequences rule; (3) the petitioner received

ineffective assistance of counsel at trial; (4) the trial court clerk failed to sign the indictment and judgment; (5) the trial court clerk failed to spread the indictment upon the court minutes; (6) the trial court failed to conduct a separate sentencing hearing; (7) the petitioner received ineffective assistance on appeal; (8) the indictment was not personally signed by the district attorney general; (9) the petitioner was improperly sentenced to life imprisonment rather than a term of 15 - 25 years as a Range I, standard offender; (10) the state relied upon perjured testimony to support the conviction; and (11) the trial court failed to instruct the jury on a common design or plan between the defendant and another person.

On March 16, 2005, the trial court dismissed the petition. The trial court found that the majority of the petitioner's claims, 1, 2, 3, 6, 7, 10 and 11, were not cognizable because, even if proven, they would render the judgment merely voidable and not void. As to these claims, the trial court further concluded that the petition could not be treated as a petition for post-conviction relief because the petition was untimely filed and the petitioner had previously sought post-conviction relief from the same judgment. The court found that the petitioner's claims of a void judgment based on the lack of signatures of the prosecutor and the trial court clerk on the indictment, the failure of the trial court clerk to sign the judgment, and the claim of an illegal sentence all lacked merit. The instant appeal followed.¹

In Tennessee, "[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint." Church v. State, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); Tenn. Code Ann. § 29-21-101. The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. Archer v. State, 851 S.W.2d 157, 163 (Tenn. 1993) (citing State ex rel. Newsom v. Henderson, 221 Tenn. 24, 424 S.W.2d 186, 189 (1968)). A writ of habeas corpus may be granted only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964).

In the present case, the petitioner has not established that he is entitled to habeas corpus relief. He makes no claim that his life sentence has expired, and his petition does not show a void judgment, "one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment." Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). As the trial court correctly found, the majority of the petitioner's claims, being constitutional in nature, are not cognizable in a habeas corpus action because, even if proven, they would render the judgment

¹No notice of appeal is included in the record. Upon inquiry, the trial court clerk has advised that no notice of appeal was filed in the trial court. It appears, however, that an original notice of appeal was transmitted directly to the appellate court clerk on or about April 7, 2005. Under these circumstances, and in view of the petitioner's pro se status and the lack of a motion to dismiss by the state, this court, in its discretion, waives the filing of the notice of appeal in the interest of justice and proceeds to consider the appeal on its merits. See Rule 4(a), T.R.A.P.

merely voidable and not void. Moreover, the trial court correctly found that the petition could not alternatively be construed as a petition for post-conviction relief because it was statutorily time-barred and the petitioner was further barred by the single-petition rule from challenging the same conviction through a second post-conviction petition. See Tenn. Code Ann. § 40-30-102(a), (c).

In three of his remaining claims, 4, 5, and 8, the petitioner asserted that the failure of the trial court clerk to sign the indictment and judgment and to spread the indictment upon the court minutes, as well as the failure of the district attorney general to sign the indictment, renders his judgment void. The trial court correctly observed that defenses and objections based upon defects in an indictment that relate neither to the failure of the trial court to have jurisdiction nor the failure of the indictment to charge an offense must be raised prior to trial or they are waived. See Tenn. R. Crim. P. 12 (b)(2), (f). Thus, the petitioner was required to raise such objections as the lack of signatures of the court clerk and the district attorney general on the indictment pretrial, “not in a collateral, post-trial habeas corpus petition.” Nelson B. Graves v. Howard Carlton, Warden, and the State of Tennessee, No. 03C01-9705-CR-00171, slip op. at _ (Tenn. Crim. App. Mar. 25, 1998), app. denied (Tenn. Nov. 2, 1998); see also John C. Tomlinson v. Howard Carlton, Warden, and the State of Tennessee, No. 03C01-9610-CR-00389, slip op. at _ (Tenn. Crim. App., Knoxville, Oct. 2, 1997), app. denied (Tenn. Oct. 19, 1998); State v. Nixon, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997) (providing that defects “that go to matters of form rather than substance” must be raised pre-trial or they are waived pursuant to Rule 12).

The petitioner also argues that Article VI, Section 12, of the Tennessee Constitution requires judgments to run in the name of the State of Tennessee and to be signed by the clerk of the court. Our supreme court has held that a judgment is final process as opposed to the original process referenced in the section of the Constitution upon which the petitioner relies. See White v. State, 50 Tenn. (3 Heisk.) 338, 340 (1872). A judgment is not a writ or process as contemplated by Article VI, Section 12 of the Tennessee Constitution. Its form, therefore, is not dictated by Article VI, Section 12. Moreover, the judgment in this case complied with the requirements governing judgments set forth in Tennessee Code Annotated Section 40-35-209(f), Rule 32(e) of the Tennessee Rules of Criminal Procedure and Tennessee Supreme Court Rule 17. In particular, the petitioner’s judgment complies with the requirement of Rule 32(e) that “[a] judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence.... The judgment shall be signed by the judge and *entered* by the clerk.” (emphasis added). The petitioner’s claim of a void judgment based on the lack of a signature of the trial court clerk also lacks merit.

Lastly, relying on Tennessee Code Annotated Section 40-35-112, the petitioner asserts that as a Range I offender he should have received a sentence within the 15-25 sentencing range set forth in the statute. He concludes that the life sentence imposed is illegal. The trial court correctly found that the offense of first degree murder is not a Class A felony and the sentencing ranges set forth in Section 40-35-112 are therefore inapplicable in the petitioner’s case. Instead, the Code provides that sentencing upon conviction for first degree murder is governed by the provisions of Sections 39-13-202 - 39-13-208. Having considered each of the petitioner’s claimed grounds for relief, this court concludes that the trial court properly denied the petition.

Based on the foregoing and upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has failed to establish that he is entitled to habeas corpus relief based on his claim of a void judgment. Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

JAMES CURWOOD WITT, JR., JUDGE